the states tax.[17] But it is enough that there is no express constitutional limitation on this sort of thing.[18] The only implied restriction is that the federal government shall not cripple a state in the exercise of its governmental functions;[19] but corporations, even so-called public service companies, are not actual agencies of the state. Even if Congress by taxation virtually destroyed such state franchises, the courts could give no remedy.[20]

Another objection considered in the principal case was that the distinction between a business carried on by a corporation and one carried on by a partnership or individual violated the constitutional provision[21] that "all excises . . . shall be uniform throughout the United States." This clause, however, demands only geographical uniformity;[22] and, moreover, the difference between corporations and partnerships is a substantial one.[23] The various other objections the court dismissed with little difficulty.[24]

In summary, it may be said that the case of *Flint* v. *Stone Tracy Co.* is important for two reasons: it settles a question of vast importance to business interests throughout the whole country, and to the federal, and incidentally to the state, revenue; and it establishes firmly the distinction between a tax on income from property and a tax on a privilege measured by that income. But as each link in the chain of reasoning necessary to support the tax had previously been decided by the Supreme Court, it forms no notable addition to the constitutional history of taxation.

WAIVER OF STOCKHOLDERS' LIABILITY. — In a recent case the plaintiff, relying on the representation that the shares of corporate stock had been fully paid for, purchased bonds of the corporation, each bond containing a waiver of all remedies against the stockholders. The stock had in fact been paid for with land accepted at a gross overvaluation; and, upon the corporation's becoming insolvent, this action was brought to recover the balance due on the shares. The court held the shareholders liable since the waiver was not intended to include any right arising from misrepresentation. *Downer* v. *Union Land Co.*, 129 N. W. 777 (Minn.). By the better authority a person dealing with a corporation may by express agreement waive a constitutional or statutory liability of the stockholders and agree to look only to the corporation and

[17] This was pointed out by the court in the principal case.
[18] See GRAY, LIMITATIONS OF TAXING POWER, 345.
[19] See South Carolina *v.* United States, 199 U. S. 437, 461.
[20] But *cf.* Flaherty *v.* Hanson, 215 U. S. 515.
[21] U. S. CONST., Art. I, § 8.
[22] Knowlton *v.* Moore, *supra.*
[23] See Flint *v.* Stone Tracy Co., *supra*, 563.
[24] The other objections were, in brief, as follows: that the bill did not originate in the House of Representatives; that the method of measuring the tax is arbitrary; that the $5000 limit is arbitrary; that the exception of certain associations is arbitrary; that the details of deducting interest payments by banks are arbitrary; and that the provision regarding tax returns involves unreasonable searches and seizures. The court declined to consider the objection that foreign corporations, doing a local business in a state, are not within the control of Congress for taxing purposes, as no such case was presented in the record.

its property for the payment of his debt.[1] But it is a general principle of the law of waiver that there must be the intentional relinquishment of a known right; in other words, there must be knowledge of all the facts and circumstances attending the creation of the right alleged to have been waived.[2] The liability in this case is based not on a statutory provision but on a misrepresentation of fact in stating the amount of capital to be greater than it was.[3] And as this circumstance was wholly unknown to the plaintiff, the court in arriving at its decision merely applied the general principle of waiver in construing the agreement, and held such right not to have been within the contemplation of the parties and therefore not included in the waiver.

An interesting question is left unsettled, as to whether there may be express provision against such liability. While the defense of fraud in a contract may be waived subsequently to its discovery by the defrauded person,[4] a stipulation in the original contract waiving that defense is generally held invalid, either on the ground that the waiver being part of the fraudulently obtained contract was itself obtained by fraud and is therefore invalid, or because public policy forbids such agreements.[5] This rule has not been universally followed,[6] especially in the case of incontestability clauses in insurance policies.[7] A waiver of any right of action arising out of the contract would necessarily be governed by the same principles as a waiver of a defense to an action on the contract. Where an agreement provided that the plaintiff must verify all representations for himself and not rely on their accuracy, it was construed to mean an assumption by him of the risk of honest mistakes but not of fraud,[8] and a similar interpretation would be placed on a provision referring to a particular representation. An express stipulation in the bond to the effect that the bondholder has in no way relied on any representation that the stock has been paid in full should be held valid since it takes effect not as a waiver of an existing right of action but as showing no reliance on the representation and hence no fraud in the transaction. But the courts would be very astute in ferreting out some fraud as a ground for setting the contract aside, and would be especially inclined to do so if not clearly shown that the bondholder had actual notice of the stipulation.[9] In jurisdictions where the stockholders' liability in such cases is based on the "trust fund" theory,[10] no difficulty would arise where the bondholder actually knew of the stipulation, since a right in the trust fund may be released and a sufficient consideration for the release is found in the issuing of the bond to him.

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[1] Bush *v.* Robinson, 95 Ky. 492. *Contra*, Kreisser *v.* Ashtabula Gas Light Co., 24 Oh. Cir. Ct. Rep. 313.

[2] Fairview R. Co. *v.* Spillman, 23 Or. 587, 592.

[3] Hospes *v.* Northwestern Mfg. Co., 48 Minn. 174, 197.

[4] Wheeler *v.* McNeil, 101 Fed. 685.

[5] Bridger *v.* Goldsmith, 143 N. Y. 424.

[6] For example, in the case of building contracts where provision is made that the architect's certificate cannot be set aside on grounds of fraud or collusion. Tullis *v.* Jacson, [1892] 3 Ch. 441. *Contra*, Redmond *v.* Wynne, 13 N. S. W. L. Rep. 39.

[7] See 24 HARV. L. REV. 53.

[8] Pearson *v.* Dublin Corporation, [1907] A. C. 351.

[9] See Greenwood *v.* Leather Shod Wheel Co., [1900] 1 Ch. 421, 437.

[10] See 20 HARV. L. REV. 401. This theory is that the corporation holds in trust for its creditors any right against shareholders for amounts due on their stock.